Supreme Court, U.S.
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No. 83-1231

IN THE
United States Supreme Court
OCTOBER 1983 TERM

GEORGE R. TESLOVICH,
Petitioner (Appellant Below)

v.

UNITED STATES OF AMERICA,
Respondent (Appellee Below)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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January 25, 1984

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the affidavit for search warrant was insufficient to establish probable cause.

2. Whether the seizure of the accountant workpapers exceeded the scope of the search warrant.

3. Whether owners of property have standing to move to suppress the fruits of illegal searches of rooms on that property.

4. Whether an improper return and inventory of property taken was made on the search warrant.

PARTIES

The only parties presented in this petition are those named in the caption of the case, George R. Teslovich (Petitioner, Appellant Below), and the United States of America (Respondent, Appellee Below).

Counsel for George A. Solomon, an appellant below, is filing a petition on his behalf. His case was consolidated with petitioner Teslovich's for decision in the United States Court of Appeals for the Third Circuit.

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IN THE

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No.

GEORGE R. TESLOVICH,
Petitioner (Appellant Below)

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UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS IN COURTS BELOW

The opinion of the United States Court of Appeals for the Third Circuit in this case has not yet been published in official form. The court's slip opinion is reproduced in the Appendix to this petition. *United States of America v. George A. Solomon,* No. 83-5312, *United States of America v. George R. Teslovich,* No. 83-5313, and *United States of America v. George M. Teslovich, Jr.,* No. 83-5359, (3rd Cir.).

The United States District Court for the Western District of Pennsylvania denied the defendant's motion to suppress and the findings of fact and conclusions of law of the District Court Judge and are reproduced in the Appendix.

GROUNDS OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit in this case was dated and entered on the 5th day of December, 1983. No motion for re-hearing was made, and no extension of time for filing this petition was requested.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. §1254 to review the judgment, by writ of certiorari granted upon timely petition of a party (here, George R. Teslovich, Appellant Below).

The judgment of the United States Court of Appeals for the Third Circuit is final with respect to the issues presented in this petition. The appellate court's judgment is ripe for review at this time.

CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES, AMENDMENT IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

CONSTITUTION OF THE UNITED STATES, AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be sub-

ject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL RULES OF CRIMINAL PROCEDURE, RULE 41(d)

(d) Execution and Return with Inventory

The officer taking property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property taken or shall leave the copy and receipt at the place from which the property was taken. The return shall be made promptly and shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be verified by the officer. The federal magistrate shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

STATEMENT OF THE CASE

In early 1979, Richard Geitgey of the FBI was involved in an investigation into a possible coal fraud occurring at the Hatfield Power Station in Western Pennsylvania. This investigation had focused upon a company called Suncrest

Environmental Resource, Inc., which was a supplier of coal to the Hatfield Power Station. In July of 1979, Henrietta Foster, an employee of Suncrest, came forward and provided information purportedly relating to a scheme within Suncrest to defraud the West Penn Power System by shipping inferior coal to the Hatfield Power Station. She provided this information to Geitgey and at the same time turned over to him two sealed packages of documents which had been given to her for safekeeping by her employer, Philip Gaziano. She had been told by Gaziano that the envelopes contained records of Solomon & Teslovich, Inc. Following an analysis of the contents of these two sealed packages and some limited investigative work, Agent Geitgey sought to have a search warrant issued to search the business premises of Solomon & Teslovich, Inc. On December 19, 1979, the FBI conducted a search, pursuant to a search warrant, of the offices of Solomon & Teslovich, Inc. During the course of this search, the FBI seized, among a multitude of other things, the personal accountant workpapers belonging to Frank Lucas, the accountant for Solomon & Teslovich, Inc. Agent Pino of the FBI prepared an inventory of the items seized in this search.

George A. Solomon, George R. Teslovich, and George M. Teslovich, Jr., were subsequently indicted in the Western District of Pennsylvania for various income tax violations based primarily upon the records seized in the December 19, 1979, search. These three defendants, through counsel, proceeded to file various pre-trial motions, including motions to suppress the evidence seized in the December, 1979, search. Hearings were held and evidence was received on these motions in January, 1983. The Honorable Donald E. Ziegler, United States District Judge for the Western District of Pennsylvania at Pitts-

burgh, subsequently denied the defendants' motions for suppression of this evidence.

The defendants subsequently entered into plea agreements with the United States Attorney and entered pleas of guilty pursuant to those agreements. These pleas of guilty were conditioned upon appellate review of the District Court's ruling on the various motions to suppress. All three defendants have now been sentenced and remain on bond pending appellate review.

ARGUMENT

Issue I

As can be seen from an examination of the affidavit for search warrant much of the information relied upon by Agent Geitgey in obtaining the search warrant was provided by an informant, Henrietta Foster. The contention is that the affidavit as a whole does not establish probable cause for the issuance of a search warrant, and further it is here argued that the information supplied by Henrietta Foster and contained within the affidavit was not demonstrated to be reliable to the degree that is required by the United States Constitution. As a result, the search warrant in question here should not have been issued and the evidence seized pursuant to that search warrant must be suppressed.

At the outset, it is important to remember that a reviewing court, in passing on the validity of a search warrant, may consider only the information that was brought to the magistrate's attention at the time he issued the warrant. *Aguilar v. State of Texas,* 378 U.S. 108, 84 S.Ct. 1509 (1964). In this case, since the only information that was submitted to the magistrate is contained in the affidavit

for search warrant, the Court is limited to reviewing the magistrate's decision based upon what is contained within the four corners of that affidavit.

In *Illinois v. Gates*, ___ U.S. ___, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983), this Court rejected the mechanical test of *Spinelli* and replaced it with a "totality of the circumstances approach." This approach suggests that a magistrate should review all of the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, and determine if there is a fair probability that contraband or evidence of a crime will be found in a particular place. The Court, however, by discarding the technical requirements of *Spinelli*, did not discard the factors that *Spinelli* indicated should be considered by the magistrate. The decision merely changes how those factors should be applied to a particular case. Thus, *Gates* clearly established that an informant's veracity or reliability and his basis of knowledge are still to be considered as relevant considerations in the totality of circumstances analysis that should be applied to the probable cause determination.

Of particular importance to the case at hand is the recognition of the value of corroborating evidence in establishing the sufficiency of an affidavit which relies on hearsay to establish probable cause. *See Gates, supra*, 76 L.Ed.2d at 550. As applied to this case, it is apparent that whether the hearsay statements provided to Agent Geitgey and set forth in the affidavit were sufficient to establish probable cause for the issuance of the warrant will depend strongly upon the extent to which the veracity of Ms. Foster and her basis of knowledge for the information supplied are adequately established. In this connection, it is especially relevant to look to the affidavit to see what in-

dependent evidence is submitted to corroborate the hearsay information provided by Ms. Foster.

A review of the affidavit in this case clearly shows that the hearsay information of Henrietta Foster dealt with matters occurring at her place of employment, Suncrest Environmental Resource, Inc. Paragraphs four through five of the affidavit delve into a lengthy discussion of a fraudulent scheme engaged in by Suncrest Environmental Resource, Inc., through its owner and president, Philip Gaziano, as told to Agent Geitgey by Henrietta Foster. These allegations of criminality occurring at Suncrest, even if proven to be reliable, were wholly irrelevant to the question of whether there was criminality occurring at Solomon & Teslovich, Inc. There is absolutely no significant relationship between Suncrest Environmental Resource, Inc., and Solomon & Teslovich, Inc. It is obvious that Agent Geitgey's intention was to attempt to construct some kind of connection between the fraudulent scheme he believed was going on at Suncrest and the Solomon & Teslovich records that he had been supplied by Henrietta Foster. Knowing that the records of Solomon & Teslovich themselves were not sufficient to establish probable cause to believe that there was evidence of criminal activity on the premises of Solomon & Teslovich, Inc., Agent Geitgey sought to construct an artificial similarity between the Suncrest scheme as related by Henrietta Foster and his own hopes as to what the Solomon & Teslovich records indicated. Agent Geitgey's imagination, however, took him well beyond the reasonable bounds of acceptable information that must be provided to a magistrate before the government can be allowed to force its way into a citizen's place of business and seize his property against his will.

A realistic view of the facts suggests that there is no reliable or credible information contained within the af-

fidavit which can substantiate Agent Geitgey's unsupported conclusion that since Philip Gaziano was a former employee of Solomon & Teslovich and had stated to him that Solomon & Teslovich were great teachers, the reported scheme taking place at Suncrest must have been transported from Solomon & Teslovich to Suncrest by Philip Gaziano. The fact of the matter is that Agent Geitgey, realizing that the facts he had were not sufficient to establish probable cause, completely manufactured the connection between the two entities. Of course, this connection could not have been constructed had it not been for Henrietta Foster's tale of fraud at Suncrest. Thus, the reliability of her information is crucial to the validity of this warrant. The only information relied upon by Agent Geitgey in corroborating the story told to him by Henrietta Foster concerning Suncrest is contained within the fourth subparagraph of paragraph number four of the affidavit.

First, Agent Geitgey contends that he considered the information provided by Henrietta Foster to be reliable due to the fact that she was incriminating herself with this information. This statement alone is not sufficient to add credence to Ms. Foster's story. The mere fact that the information provided was incriminating to Ms. Foster in Agent Geitgey's own mind is irrelevant. The relevant question is whether or not Ms. Foster herself considered the information she was relating to be incriminating to her. If she did not in her own mind think that she was incriminating herself then there is no basis for concluding that the information is reliable. The affidavit itself contains nothing from which it can even be inferred that Ms. Foster felt that she was incriminating herself by providing the information. In point of fact, Ms. Foster testified at the suppression hearing in this matter to the effect that she did

not think that she was incriminating herself at the time she provided Agent Geitgey with the information. Therefore, Henrietta Foster's information cannot be considered reliable on this basis.

The remainder of the corroborating circumstances asserted by Agent Geitgey are nothing more than isolated facts drawn together by Agent Geitgey to paint an unsubstantiated picture of guilt on the part of Philip Gaziano. As to Philip Gaziano's actions pursuant to the FBI investigation of Suncrest, his actions demonstrate nothing more than a fear of the grand jury system. While he may have indeed had something to hide, the facts related in the affidavit do not logically lead one to the conclusion that Gaziano was in fact guilty of the type of scheme related by Henrietta Foster. Likewise, his relationship with Alfred Royster can in no way be construed as being in conformity with the Foster story. The fact of the matter is that the affidavit contains no concrete reliable independent evidence that would indicate that Philip Gaziano or anyone at Suncrest was participating in a scheme in the nature of that described by Henrietta Foster.

Since there is no rational basis for according any credence to Henrietta Foster's hearsay statements concerning the activities at Suncrest, Agent Geitgey's weak attempt to fashion two related schemes at both Suncrest and Solomon & Teslovich, Inc. must fail.

Likewise, Henrietta Foster's statements to the effect that Philip Gaziano had told her that the two manila envelopes described in paragraph number seven of the affidavit contained Solomon & Teslovich business records which were hot and incriminating to Solomon & Teslovich are patently unreliable. First of all, these allegations made by Henrietta Foser cannot be deemed to be incriminating

in any way to her. Therefore, her statements cannot be regarded as reliable on that basis. Second, the comments made by Philip Gaziano are nothing more than second hand hearsay. Not only are there no corroborating facts to substantiate Henrietta Foster's reliability, but there are in addition no corroborating facts to substantiate Philip Gaziano's statements. Thus, one cannot rely on these statements to establish probable cause.

Additionally, there is no indication within the affidavit itself that the records from the two manila envelopes were actually Solomon & Teslovich business records. The only evidence to substantitate that belief are the statements made by Philip Gaziano and the records themselves. There is no attempt made within the affidavit to establish the reliability of Philip Gaziano, thus, these statements must be disregarded. As to the records themselves, there is nothing within the affidavit which indicates that these records actually came from Solomon & Teslovich, Inc., or that the notations or writings contained on them were placed there by Solomon & Teslovich. It is just as conceivable that these were records which were incriminating to Philip Gaziano personaliy. Otherwise, he would have had no reason to want to destroy those documents. It could be that the more rational conclusion to be reached from the facts as presented by the affidavit is that Philip Gaziano was conducting some type of fraudulent scheme on his own for his own benefit while an employee at Solomon & Teslovich without their knowledge. Upon forming his own business at Suncrest, he merely continued those fraudulent practices in his new business. There is nothing within the affidavit to suggest that any scheme was ongoing at Solomon & Teslovich apart from Gaziano.

In summary, in analyzing the affidavit in light of the totality of circumstances standard established by *Gates*,

supra, the magistrate in this case had no basis upon which to conclude that there was a fair probability that evidence of a crime would be found on the business premises of Solomon & Teslovich in December of 1979. Considering the affidavit as a whole, including the veracity and basis of knowledge of persons supplying hearsay information, namely Henrietta Foster and Philip Gaziano, there is not sufficient corroboration of the details of the information supplied to grant a substantial basis for crediting the hearsay presented within the affidavit. Therefore, the search warrant in this case should not have been issued and the evidence seized as a result of the search pursuant to that warrant should have been suppressed.

Issue II

The search warrant issued in this case authorized the seizure of

> business records located at Solomon & Teslovich, Inc., and which pertain to the business activities from January 1, 1975 to present of Solomon & Teslovich, Inc., but limited to all cash receipt and disbursement journals and ledgers, checks, wire transfers, books of account; in addition thereto any other writings pertaining to Solomon & Teslovich, Inc., which reflect payments to employees or agents of unions, United States Steel, Penndot, or other business or governmental entities . . .

In executing this search warrant, agents of the FBI seized the personal accounting workpapers belonging to Frank Lucas. Frank Lucas was not an employee of Solomon & Teslovich, Inc., but had contracted with Solomon & Teslovich, Inc., to prepare their federal income tax returns. He maintained a private office on the premises of

Solomon & Teslovich, Inc., to which he had a key, and maintained a private file cabinet within that office in which he kept his personal files. He kept the file cabinet locked and maintained the only key to the cabinet. Within this private file cabinet, Frank Lucas kept his workpapers used in preparing the tax returns for Solomon & Teslovich, Inc., as well as for other of his clients. These personal workpapers were seized by the FBI pursuant to the search warrant on December 19, 1979. Since these workpapers were the personal property of Frank Lucas rather than Solomon & Teslovich, Inc., and clearly fell outside the scope of the search warrant, they should have been suppressed as illegally seized evidence.

It is clear within the law that an accountant's workpapers are his own personal property. *United States v. Fisher,* 352 F.Supp. 731 (E.D. Pa. 1972), affirmed, 500 F.2d 683 (3rd Cir. 1974). Frank Lucas himself testified to the fact that the workpapers that were seized were his own personal records. In addition, both Agent Joseph Lawler and Agent James Vighetti of the IRS testified that the IRS considers accountant workpapers to be the property of the accountant rather than the company to which they pertain. Thus, it is clear that these seized workpapers belonged to Frank Lucas and were his records, rather than being the business records of Solomon & Teslovich. As a result, the search warrant issued in this case did not authorize their seizure.

One of the chief evils which the Fourth Amendment was designed to eliminate was the use of general searches. As was held in *Marron v. United States,* 275 U.S. 192, 195, 48 S.Ct. 74, 75, 72 L.Ed. 231 (1927), "general searches have long been deemed to violate fundamental rights. It is plain that the Fourth Amendemnt forbids them."

It was because of the widespread use of Writs of Assistance issued to revenue officer, while under English rule, that the drafters of the Constitution deemed it to be necessary to require that no warrant be issued unless probable cause, supported by oath or affirmation, be shown to a judicial officer and to require that the place to be searched and the persons or things to be seized be described with particularity.

> The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant. *Id.* 275 U.S. 196, 48 S.Ct. 76.

In *Marron, supra,* the Court held that a search warrant authorizing the search of premises for intoxicating liquors and articles used for the manufacture of intoxicating liquors did not authorize the seizure of ledgers showing inventories, receipts or expenses. Because the Fourth Amendment specifically limits searches and seizures to those things specifically and particularly described, the Court held that the seizure of things that were not particularly described was not authorized by the warrant and was prohibited by the Fourth Amendment.

Another case recently affirmed the principles established in *Marron,* in *Walter v. United States,* 4478 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980). In *Walter, supra,* it was held that when a search is authorized by a search warrant, the scope of the search is limited by the terms of its authorization and the Fourth Amendment prohibition of general searches prevents the seizure of one thing under a warrant describing another.

Under the principles enunciated by the Court in these cases, the seizure of any document or other article which was not particularly described in the search warrant issued in this case violates the Fourth Amendment. Consequently, any article which was seized on December 19, 1979, and which was not particularly described in the search warrant should have been suppressed.

Since the search warrant in this case authorizes only the seizure of the business records of Solomon & Teslovich, Inc., pertaining to the business activities of Solomon & Teslovich, Inc., the accountant workpapers of Frank Lucas are not specifically and particularly described in the warrant. Therefore, the seizure of those personal workpapers was outside the scope of the warrant and in violation of the Fourth Amendment. As a result, they should have been suppressed.

In the present case, the government seeks to introduce the very same evidence seized in violation of the search warrant. The government did not discover the documents from other, independent means. Yet, the government asked the court to believe that although it already had the documents and microfilmed them, it didn't look at them; it obtained these very same documents from an entirely independent source, the grand jury subpoena. Such assertions, as in *United States v. Griffin,* 502 F.2d 959 (6th Cir., 1973), *cert. denied,* 419 U.S. 1050 (1974), are beyond judicial review and their acceptance by the court would undercut the search warrant requirement of the Fourth Amendment.

The government has tried the same tack before without success. In one of the first cases to enunciate the independent source exception, *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920), the government had

indicted and arrested the defendants. While the defendants were in custody, members of the Department of Justice conducted a warrantless search of the company offices and took all documents. Before returning the documents, the government photocopied them and reframed the indictment. Then the government served subpoenas on the defendants to produce the originals. When the defendants refused to produce the same documents the government already had copied, they were found in contempt of court. This Court found that the independent source rule did not apply in this situation and viewed the government's position with derision:

> It is that although, of course, its seizure was an outrage which the government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them. . .

251 U.S. at 391.

Obviously, then, the government cannot extricate itself from the illegality of its actions by reliance on these exceptions to the exclusionary rule. Frank Lucas' work papers should have been suppressed.

Issue III

The Third Circuit found that the appellant lacked standing to object to the search of the room that the corporation allowed their CPA to use. The Court held that the papers seized belonged to the accountant and that the room, even though it was on the premises of Solomon and Teslovich, Inc., was a room that the Certified Public Accountant used and therefore, the appellant lacked the requisite standing to object to the search.

It is abundantly clear that *Mancusi v. DeForte*, 392 U.S. 364, 20 L.Ed.2d 1154, 88 S.Ct. 2120 (1968), gives standing to the appellant to object to the search based on both the items seized and the premises searched.

It is, therefore, clear that the Third Circuit's reliance upon lack of standing is totally without merit and should be reversed.

Issue IV

Rule 41(d) of the Fed. R.Crim.P. provides that upon a search and seizure pursuant to a warrant, a written inventory of any property taken must be made and filed with the return. The written inventory returned with the warrant in this case was not sufficient to satisfy the requirements of Rule 41(d). First, the written inventory, which was prepared by Agent Gerry Pino of the FBI does not indicate on its face that the inventory was taken in the presence of the applicant for the search warrant, Agent Richard Geitgey, and the person from whose possession or premises the property was taken, or in the presence of at least one credible person, as is required by Rule 41(d). Additionally, while the written inventory was signed by Agent Pino, the written inventory was not verified by him under oath as required by the rule. Thus, it is apparent that the written inventory filed with the return in this case did not meet the procedural requirements of Rule 41(d).

In addition to not satisfying the procedural requirements of Rule 41(d), the inventory filed in this case did not list the items taken with the degree of specificity required to inform the magistrate precisely of what documents were seized. An examination of the written inventory indicates that the documents were listed according to box numbers. For example, on page one of the written inventory, it is in-

dicated that box number two contained records of Solomon & Teslovich regarding financial matters. There is no explanation as to how many documents are contained in this box or a specific designation for each of these documents. Many of the other items listed within the inventory are similarly vague. Furthermore, some of the boxes are even classified as containing "miscellaneous documents."

It is apparent that this written inventory gives neither the magistrate nor the person from whose possession the property was taken an adequate accounting or listing of the property taken. Thus, it would be impossible for a person aggrieved by the search to make any type of specific motion for return of property or motion to suppress based upon this inventory. Likewise, should the government be compelled to return the property seized, it would be impossible for the owner to determine if every item seized had been returned. Therefore, the intent and purpose of Rule 41(d) has not been satisfied by the written inventory filed in this case.

As a result of the failure of the government to execute a proper inventory in this case, every document seized by the government pursuant to the search warrant issued in this case should be returned pursuant to Rule 41(e) of the Fed.R.Crim.P. Only by returning all of the items seized can the lawful owners be assured of an accurate and full accounting of the property taken from them. Anything less than a full return would leave Solomon & Teslovich in the untenable position of not having an accurate accounting of the documents seized and those returned to them. Rule 41(e) also provides that if property is required to be returned to the owners, that property shall not be admissible as evidence at any hearing or trial. Therefore, all of the

evidence seized pursuant to the search warrant in this case should have been suppressed.

CONCLUSION

For all of the reasons set forth herein, this Court should grant the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit, and should resolve these issues which are of fundamental importance to the criminal justice system.

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January 25, 1984

APPENDIX A

UNITED STATES COURT OF APEPALS
FOR THE THIRD CIRCUIT

Nos. 83-5312/13 and 83-5339

UNITED STATES OF AMERICA

v.

GEORGE A. SOLOMON,
Appellant in No. 83-5312

GEORGE M. TESLOVICH, JR.,
Appellant in No. 83-5313

GEORGE R. TESLOVICH,
Appellant in No. 83-5339

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN DISTRICT
OF PENNSYLVANIA

(D.C. Criminal Nos. 82-00171-01/03/02)
District Judge: Hon. Donald E. Ziegler

Before: GIBBONS and SLOVITER, *Circuit Judges*
and GREEN, *District Judge*

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and were submitted under Third Circuit Rule 12(6) on December 2, 1983.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgments of the said District Court entered April 20, 1983 in Criminal No. 82-171-03, entered on April 22, 1983 in Criminal No. 82-171-01 and entered April 28, 1983 in Criminal No. 82-171- 02, appealed here respectively, be and the same are, hereby affirmed.

/s/ _____
N. Elizabeth Ferguson
Deputy Clerk

Dated: December 5, 1983

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 83-5312/13 and 83-5339

UNITED STATES OF AMERICA

v.

GEORGE A. SOLOMON,
Appellant in No. 83-5312

GEORGE M. TESLOVICH, JR.,
Appellant in No. 83-5313

GEORGE R. TESLOVICH,
Appellant in No. 83-5339

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF PENNSYLVANIA

(D.C. Criminal Nos. 82-00171-01/03/02)
District Judge: Hon. Donald E. Ziegler

Submitted Under Third Circuit Rule 12(6)
December 2, 1983

Before: GIBBONS and SLOVITER, *Circuit Judges*
and GREEN, *District Judge**

(Filed: Dec 5 1983)

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*Hon. Clifford Scott Green, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

MEMORANDUM OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

George A. Solomon, George R. Teslovich and George M. Teslovich, Jr. pled guilty to charges of income tax evasion, reserving the right to appeal from the denial of their motion to suppress evidence. *See United States v. Moskow,* 588 F.2d 882, 885-90 (3d Cir. 1978). They contend that the books and records seized from the office of Solomon & Teslovich, Inc. on December 19, 1979 should have been suppressed.

The affidavit used in applying for the search warrant relied on information contained in a package of records in the possession of Henrietta Foster, which she was holding for Philip Gaziano. The appellants contend that opening the package and the records was a warrantless search in violation of the fourth amendment. Only Gaziano had any expectation of privacy in the package. *See Rakas v. Illinois,* 439 U.S. 128, 132-49 (1978).

Appellants contend that the affidavit was legally insufficient in establishing probable cause for the issuance of a warrant. We have examined it in light of the governing standards announced in *Illinois v. Gates,* ____ U.S. ____, 103 S.Ct. 2317, 2332 (1983), and find it to be adequate.

Appellants contend that the warrant was insufficiently specific to limit the books and records subject to seizure. *See United States v. Johnson,* 690 F.2d 60, 63-66 (3d Cir. 1982), *cert. denied,* 103 S. Ct. 1212 (1983); *see United States v. Christine,* 687 F.2d 749, 752-53 (3d Cir. 1982). Adequacy of the description depends on the nature of the suspected criminal activity, the nature of the items to be

seized, and the difficulty of specifying volumes of records covering an extended period. In this case the warrant authorized the seizure of

> business records located at Solomon & Teslovich Inc. and which pertain to the business activities from Jan. 1, 1975 to present of Solomon & Teslovich, Inc. but limited to all cash receipt and disbursement journals and ledgers, checks, wire transfers, books of account; in addition thereto any other writings pertaining to Solomon and Teslovich, Inc. which reflect payments to employees or agents of unions, United States Steel, PennDot or other business or governmental entities.

The warrant identified certain documents – journals, ledgers, checks, wire transfers, and books of account – by type, and qualified "any other writings" as pertaining to payments to persons or entities with whom Solomon and Teslovich dealt. Under these circumstances, we conclude that the warrant was sufficiently specific.

Appellants contend that the seizure of work papers prepared by an independent accountant, Frank Lucas, from a separate office, for which Lucas had a key, and in which he kept work papers about other clients, was beyond the scope of the warrant, and violated the fourth amendment. Appellants had no property interest in the work papers and no expectation of privacy with respect to them. *See Rakas v. Illinois,* 439 U.S. 128, 132-49 (1978).

Finally, appellants contend that the agents who made the seizure failed to file an inventory satisfying Fed. R. Crim. P. 41. We find no prejudice flowing from any such failure and therefore no ground for suppressing the evidence. *See United States v. Hall,* 505 F.2d 961, 964 (3d Cir. 1974).

The judgment of sentence will, therefore, be affirmed.

TO THE CLERK OF THE COURT:

Kindly file the foregoing Opinion.

/s/ John Gibbons
Circuit Judge

APPENDIX C

Search Warrant

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

United States of America	)	Docket No.
	)	
vs.	)	Case No.
	)	
SOLOMON & TESLOVICH, INC. HEADQUARTERS	)	SEARCH WARRANT
	)	

To ROBERT C. MITCHELL
U.S. Magistrate

Affidavit(s) having been made before me by Richard R. Geitgey, S/A, F.B.I. that he has reason to believe that on the premises known as Solomon & Teslovich, Inc., trucking and excavating contractors located on Route 21, approximately seven miles east of Masontown and 3.7 miles west of PA Route 40 and 21 as they intersect in Uniontown. The site includes an asphalt parking lot adjacent to a fenced in compound containing heavy equipment and two buildings, one which appears to be a blue garage and maintenance buildings, the other a two story office building with some garages beneath. The buildings are located across the street from Richard's Restaurant and Kolenick's Sunoco Station.

in the Western District of Pennsylvania there is now being concealed certain property, namely business records located at Solomon & Teslovich Inc. and which pertain to the business activities from Jan. 1, 1975 to present of

Solomon & Teslovich, Inc. but limited to all cash receipt and disbursement journals and ledgers, checks, wire transfers, books of account; in addition thereto any other writings pertaining to Solomon and Teslovich, Inc. which reflect payments to employees or agents of unions, United States Steel, PennDot or other business or governmental entities.

and as I am satisifed that there is probable cause to believe that the propery so described in being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of ..... (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search (in the daytime (6:00 a.m. to 10:00 p.m.) at any time in the day or night*) and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before Hon. Robert C. Mitchell as required by law.

Dated this day of , 19

Judge (Federal or State Court of Record) or Federal Magistrate.

*The Federal Rules of Criminal Procedure provide: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provisions in the warrant, and for reasonable cause shown, authorizes its execution at any other than daytime." (Rule 41(c)). A statement of grounds for reasonable cause should be made on the affidavit(s) if a search is to be authorized at any time and/or night" pursuant to Rule 41(c).

Affidavit for
Search Warrant

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

Magistrate's Docket No. _____

UNITED STATES OF AMERICA	)	Case No. 79 359
	)	
vs.	)	
	)	AFFIDAVIT
SOLOMON & TESLOVICH INC.	)	SEARCH
HEADQUARTERS	)	WARRANT
	)	

BEFORE
HONORABLE ROBERT C. MITCHELL PITTSBURGH, PA

The undersigned being duly sworn deposes and says:

That he (has reason to believe) that (on the premises known as) Solomon & Teslovich Inc., trucking and excavating contractors located on Route 21, approximately seven miles east of Masontown and 3.7 miles west of PA Route 40 and 21 as they intersect in Uniontown. The site includes an asphalt parking lot adjacent to a fenced in compound contaning heavy equipment and two buildings, one which appears to be a blue garage and maintenance building, the other a two story office building with some garages beneath. The buildings are located across the street from Richard's Restaurant and Kolenick's Sunoco Station.

in the Western District of Pennsylvania there is now being concealed certain property, namely business records located at Solomon and Teslovich Inc. and which pertain

to the business activities from Jan. 1, 1975 to present of Solomon & Teslovich, Inc. but limited to all cash receipt and disbursement journals and ledgers, checks, wire-transfers, books of account; in addition thereto any other writings pertaining to Solomon and Teslovich Inc. which reflect payments to employees or agents of unions, United States Steel, PennDot or other business or governmental entities which are property which constitutes evidence of the commission of crime that is violative of Title 18, U.S.C., §1962(c); engaging activities and enterprise affecting interstate commerce and conducting the affairs of such enterprise through a pattern of racketeering activity, to wit, bribery in violation of the laws of the Commonwealth of PA.

SEE ATTACHED AFFIDAVIT

/s/ Richard R. Geitgey
RICHARD R. GEITGEY
Special Agent, F.B.I.

Sworn to before me, and subscribed in my presence.
Dec. 18, 1979

/s/ Robert C. Mitchell
United States Magistrate

AFFIDAVIT

The undersigned, being duly sworn, hereby deposes and says:

1. My name is Richard R. Geitgey, and I have been a Special Agent of the Federal Bureau of Investigation for eight years, and I am currently assigned to the Pittsburgh Office of the Federal Bureau of Investigation.

2. Since July, 1979, I have been participating in an investigation of allegations of possible violations of Title 18, U.S. Code Section 1962(c), arising both from commercial bribery of employees of public utility companies and steel producing companies, who, by their positions, can influence their employer to accept goods and services i.e. steam coal and metallurgical coal, from certain suppliers and from bribery of agents and/or employees of unions and the Pennsylvania Department of Transportation pertaining to highway construction.

3. During the course of my investigation, I have developed the following information with respect to activity of George Solomon and George Teslovich, doing business as Solomon and Teslovich, Inc., Trucking and Excavating Contractors, Masontown, Pennsylvania (hereafter "S and T").

4. Henrietta Foster, an employee and Secretary of Suncrest Environmental Resource, Inc. (SERC) – a coal brokerage company which was engaged in shipping coal to the Hatfield Power Station, West Penn Power – stated to me that SERC was engaged in a fraudulent scheme to supply low quality coal to Hatfield Power Station at premium prices. Ms. Foster stated that she personally took part in the scheme which provided as follows:

Phillip Gaziano, President and owner of SERC, would

instruct her to prepare expense checks to various persons, some of which were employees of SERC. Gaziano and she would then forge the signature of the employees and Foster would tender the checks for cash at the local banks in Uniontown, Pa. and receive cash in exchange. Gaziano would then use the cash to pay off an individual by the name of Alfred Royster, Jr., an employee of West Penn Power's Hatfield Station, usually totaling somewhere in the area of $1500 to $3000 per payment.

In return for the cash, Royster used his position as a barge unloader at the Hatfield Power Station to manipulate coal samples, barges and/or coal and barge data with receipt to SERC's such that Gaziano would be paid more than his coal was actually worth. Henrietta Foster noted that she became acquainted with Royster because of his frequent telephone contact with SERC's office. Royster would call her to get the numbers of the SERC coal barges being supplied into Hatfield. Foster would often call the barge numbers into an answering service if Royster failed to call before 5:00 P.M., and Royster would check in with the answering service to get the barge numbers.

This information is considered reliable because Henrietta Foster is incriminating herself with this information. Additionally, Gaziano has stated to me he barely knew Royster. But, it has been established through a local travel agency that Gaziano did in fact send Royster on a trip to New York and abroad and paid for the trip out of SERC funds. Additionally, a local answering service has confirmed to me the use of that service to pass four-digit (barge) numbers to a "Fred" who called for SERC information. Moreover, an official at the Hatfield Power Station has confirmed to me that Royster is in a position to affect barge samples and has been under suspicion for

such activities. Furthermore, Gaziano's actions since an investigation of SERC began indicate guilty knowledge; an employee of S and T has stated to me that she altered SERC records at Gaziano's request which were supplied in response to a grand jury subpoena investigating SERC. Lastly, a consensual monitoring of a conversation between Gaziano and Foster contained attempts by Gaziano to convince Foster to refrain from mentioning Royster or the scheme in her then pending grand jury appearance.

5. Ms. Foster also informed me that on certain occasions, Gaziano would need large amounts of cash or cashier's checks. In order to acquire this cash, Ms. Foster stated he would have her issue checks to a company and he told her he would then forge an endorsement on the back of the check, take and cash the check at Second National Bank of Masontown and use the cash for personal and business expenses.

6. I personally interviewed Philip Gaziano in July of 1979 and he stated at that time that until October of 1977, he was an accountant for Solomon and Teslovich (S and T), Inc. His job entailed handling accounts payable and accounts receivable, along with the general accounting operations required of a general contractor. Gaziano had earlier stated to reporters for the Uniontown Morning Herald — in an article appearing on October 1, 1978 — that at S and T, under the direction of his father-in-law, George Teslovich, and particularly, George Solomon (the co-owners of S and T), he had learned every phase of the company's operations. He stated that Solomon and Teslovich were "great teachers".

7. Henrietta Foster also stated that in November of 1977, when she first became employed for Gaziano as a secretary-bookkeeper, Gaziano gave to her two manila packages, which Gaziano told Foster contained records of

Solomon and Teslovich, Inc., business transactions, which occurred while Gaziano was employed at S and T. Gaziano explained to Foster that the records were "hot" and were very incriminating to S and T. Gaziano went on to explain that if the records got into the "wrong hands", the records could cause a "fire".

8. Henrietta Foster further stated that Gaziano was very concerned about the FBI's inquiries pertaining to the operations of SERC and on July 17, 1979, asked Foster to retrieve the records, which she had been keeping for Gaziano, pertaining to S and T. Foster explained to Gaziano that the records were at the home of her son in Oil City, Pa. and that it would take at least one day to retrieve the records. Gaziano instructed her to retrieve the records and return them to him for destruction.

9. I was able to verify the existence of Gaziano's "hot" records of S and T when Henrietta Foster voluntarily produced the records for the undersigned. In my presence, the two packages were opened, and documents pertaining to S and T and Redstone Hauling Co., were reflected throughout the two packages. Those records pertaining to 1976 and 1977 were copied in my presence and then returned to Ms. Foster who stated she returned them to Gaziano.

10. The "hot" records were reviewed by myself and Special Agent Thomas Powers. Incorporated herein by reference and attached hereto as Appendix A is a more detailed analysis of the Gaziano file.

Checks made out to certain companies were contained in the files and it appears that the checks were not being sent to the actual payees because:

(a) Notations along the check stub as well as notations on separate ledger sheets indicated that

although one payee was named on the check, disbursements in the amount of the check were not made to the payee but rather were made to individuals identified by name or initials on the check stub or separate ledger sheet.

(b) When Gaziano originally handed the file to Henrietta, he was careful to note that the records pertained to business transactions of S and T, were "hot", were very incriminating to S and T, and if the records got into the wrong hands, the records could cause a "fire."

11. The names and/or intitals on the ledger sheet and/or check stubs indicate payments to various individuals including "G. Solomon", "G.S.", "G. Teslovich", "F.T.", "J.A.", "Anderson", "Yurick", "C.Y.", "Conners", and "T. Pecura".

12. I have contacted an official who oversees energy purchasing contracts at United States Steel (USS) and who stated to me that S and T, and one of its subsidiaries, GAL Construction Co., had substantial contracts with USS and USS's Robena Coal Preparation Plant. Through inquiries at USS and Robena's Preparation Plant, I was told that individuals by the names John Anderson and Charles Yuric hold supervisory positions for USS in areas which, according to the information supplied by the USS official noted above, would involve S and T's contracts with USS. The names and initials "J.A.", "C.Y.", "Yurick" and "Anderson" all appear on the disbursement sheets in the Gaziano file. Additionally, the name "Anderson", and his telephone number at USS appeared in a small telephone book of Gaziano's held by Henrietta Fosters.

13. I have also been told through inquiry at the PennDot facility that an individual with the name "Conners" is in charge of new highway construction. "Conners" ap-

pears in the disbursement sheets and George Solomon, co-owner of S and T stated to me that S and T had at least one large highway construction project with PennDot.

14. George Solomon also told me that he often uses union labor for his construction jobs and that he deals often with the business manager, Tom Pecora, of Laborer's Union Local 1308. The name "T. Pecura" appears on the disbursement sheets.

15. Although the names "Anderson", "Conners" and "Arnie" appear on stubs for checks issued either to Rathway Trucking Co. or Clinto Fuel and Transportation Co., persons at those companies stated to me that no one by those names had ever worked there.

16. I interviewed Brenda Royster of the Second National bank of Masontown who is a teller at said bank and who stated to me that an individual by the name of Pat Burns who is known to her as an employee of S and T appears at her teller window and cashes S and T checks payable to other companies – with scribbled endorsements – in amounts so large that the teller often has to get additional cash from the vault.

17. I talked to George Solomon who informed me that Redstone Hauling and S and T shared corporate offices on Route 21 between Masontown and Uniontown. Mr. Solomon stated that although S and T and Redstone Hauling were separate companies because of the requirements of the Pennsylvania Public Utilities, they were, for all practical purposes, one and the same company. I personally visited the corporate offices of S and T which I observed to be located on Route 21, seven miles east of Masontown and 3.7 miles west of Pa. Routes 40 and 21 in Uniontown. The site includes an asphalt parking lot adjacent to a fenced-in compound containing two buildings, one of

which is an equipment storage and maintenance facility; the other is a two story building containing the corporate offices. While in the corporate office building, I personally observed filing cabinets containing the corporate records.

18. Solomon and Teslovich has contracts to provide coal to USS and has provided coal to West Penn Power. I have been told by officials of both USS and West Penn Power that these business relations existed during times relevant to this investigation and further, that both companies engage in business which travels in and affects interstate commerce.

19. On the basis of the information provided by Philip Gaziano, Henrietta Foster, George Solomon, and as confirmed by interviews and record examination, it is my belief that George Solomon and George Teslovich, Inc., are engaged in an activity which constitutes a violation of Title 18, United States Code, Section 1962(c). And further that there is evidence of the commission of said criminal activities located on the premises of Solomon Teslovich, Inc./Redstone Hauling, Inc., whose corporate offices are located on Route 21 between Uniontown and Masontown, Pa. Said evidence includes S and T's cash receipt and disbursement journals and leders, checks, wire-transfers and books of account; in addition thereto, any other writings which reflect payments to employees or agents of unions, USS, PennDot or other business or governmental entities.

/s/ Richard R. Geitgey
/s/ Robert C. Mitchell

APPENDIX "A" TO AFFIDAVIT OF SPECIAL AGENT RICHARD R. GEITGEY

When Special Agent Accountant Thomas Powers and myself reviewed the documents maintained by Foster for Gaziano (the Gaziano file), the following observations were made: Seventy-two pages of documents were copies in the Pittsburgh Office of the FBI.

Pages 6 and 7 of the Gaziano file contained accounting work papers reflecting business activity from May 25 through June 29, 1977. The two pages reflected allocation of funds to the following individuals: G. Solomon; G. Teslovich, "J.A." Conners; C.Y.; Andy B.; Boz Z.; Police Party; Goldman; T. Pecura; A.K.; G.S.; and G.T. McDonald; Salty; along with other minor allocations. Pages 6 and 7 appear as work papers, inasmuch as no account is noted on the two pages, and entries are made for the days of May 25, May 27, June 9, June 15, June 16, June 22, June 26, and June 29. The work papers began with a specific entry of an irregular amount of money, such as $10,119.38, and disbursements were reflected from a given entry working toward a zero balance. Other documents in the Gaziano file supported where the cash was generated in order to make allocations to the individuals listed on Pages 6 and 7. For example, Page 6 entry, May 25, in the amount of $43,875, relates specifically to S and T check number 57621, dated May 25, 1977, payable to the David Davis Coal Company, 108 Lang Court, Pittsburgh, PA, in the amount of $43,875. Page 4 is a voucher copy of the aforementioned check, and critic notations are found on the voucher copy identical to the entries made on Page 6 under the amount of $43,875. Written on the voucher copy of the check (Page 4), we found the initials 'G.S." next to the handwritten entry of $4,400 and the initials

"G.T." written next to another handwritten notation of $4,400. Additionally, on the same document, were the initials "J.A." next to the handwritten notation of $35,000. And lastly, we have the handwritten entry of "MIS" next to the amount of $71. A the bottom of the voucher copy, Page 4, a total of $43,871 reflects a total $4 short of the amount of check number 57621. The work papers reflect a "MISC" of $75 with a handwritten correction from $71 to $75, therefore, showing a zero balance pertaining to the disbursement of monies from the check made payable to the David Davis Coal Company.

On June 9, an entry was made on the work papers in the amount of $9,151.38. The work papers explain the following allocations: T. Pecura - $500; "MISC" - $150; G.S. - $4,250; G.T. - $4,250, reflecting a zero balance for the June 9 entry. On Page 44 was found a handwritten piece of paper listing four Commonwealth of Pennsylvania checks numbered 0134101, 0134100, 0134102, and 0134105. Another handwritten notation, "Zurick - AM. INS. CO. ck number 320517 - $993.40," and one additional entry, "Fizel Coal and Drilling Co., number 2774, $552.98." At the bottom of the handwritten tally was the total $9,151.38, reflecting receipts from the Commonwealth of Pennsylvania, Zurick AM. INS. CO., and Fizel Coal and Drilling Co. On Pages 47 and 48 are found copies of the aforementioned Commonwealth of Pennsylvania Treasury Department checks, all of which were issued on June 1, 1977, to Solomon and Teslovich. The tally found on Page 44 and the checks found on Pages 47 and 48 total the entry found under June 9 on the work papers.

Another entry was noted on June 9 on the work papers totaling $5,544. The work papers reflected that G.S. received $2,770, and G.T. received $2,770, with $4 re-

maining. Page 45 of the Gaziano file reflects a statement from S and T to Pennsylvania State University, Fayette Campus, Uniontown, PA, billing Pennsylvania State University $5,544 for dozer and grading work done at the Fayette Campus. A handwritten notation on the billing noted "PD 6-9-77 #02116300." The date the check was noted paid on the aforementioned statement is the same date used for the entry in the work papers.

On June 15, an entry was made in the work papers in the amount of $12,000. Below it, we found "G.S. - $2,000; G.T. - $2,000; G.T. (Renee Chess acct.) - $8,000; and a zero balance. On Page 63 of the Gaziano file was found a 1976 miscellaneous income, Department of the Treasury - Internal Revenue Service Form No. 1087-MISC. The form reflects that S and T, Box 763, Masontown, PA, received $8,829.70 in royalties from Raymond N. Chess, RD 1, Box 151, Smithfeld, PA 15478. "Copy B" for the recipient was the copy on Page 63. The total for these royalties is slightly more than the $8,000 notation in the work papers dated June 15.

An entry was noted on the work papers for June 22 totalling $9,782.50. Below the entry the following funds were allocated: "McDonald $500, AK. $3,000, C.Y. $5,000, Conners $1,000, Misc $282.50" and also noting a zero balance. On page 49, we found an S&T check number 58194 dated June 22, 1977, made payable to Mitchell Brothers Klondike Tire Company, Box 706, Masontown, Pa., in the amount of $9,782.50. On page 50, we found a notation which was partially illegible ". . . hell Bros Tire" and the following allocations noted under the heading: 500.00 McDonald, $3,000 Arnie, $5,000 Yurick, $1,000 Conner. A tally line was drawn and a total of $9,782.50 was noted on page 50 which coincides with the June 22 entry on the work papers working backwards to a zero balance.

Located on the work papers between an entry of May 27 and an entry of June 9, appears the entry of $10,119.38. Below the entry was the name Goldman $5,782.50, an entry "G.S." $2,166, "G.T." $2,170. A tally line was drawn and a zero balance was noted. On page 46 of the Gaziano file, an adding machine tape was located reflecting the same entry, $10,119.38. The adding machine tape reflected the subtraction of $5,782.50, leaving a remainder of $4,336.88. Handwritten notations on the adding machine tape reflected one figure 2,166 and another figure 2,170. These are the exact amounts allocated to G.S. and G.T. noted on the work papers.

The work papers denote activity for only two months; however, additional observations were made which reflect allocations of moneys contrary to the customary purpose for which checks are issued. On page 15 of the Gaziano file, we found a check dated July 27, 1977, from S&T, check number 58885, payable to the David Davis Coal Company, in the amount of $22,212.50. On page 14 of the Gaziano file, we found a check stub totalling $22,212.50. The check stub noted that Gregg was allocated $100.00 and Crimbly was allocated $1,658.21. Also noted on the check stub was the initials G.T. 20,000. If all of the notations found on the check stub are scheduled, we found that of the $22,212.50, all of its was accounted for on the check stub with the exception of $454.29. It should be noted the S&T check stub was in exactly the same amount $22,212.50 as the check issued to the David Davis Coal Company on July 27, 1977.

An S&T check number 59469 dated Augsut 19, 1977, payable to the Clinton Fuel Company, Inc., Saxonburg, Pa., was issued in the amount of $26,855. On the voucher copy of the check, we found the handwritten cryptic notes: G.S. $25,000, G.T. $25,000, Misc $732.47. On page 19 of

the Gaziano file, we found S&T check #59468 dated August 19, 1977, payable to the David Davis Coal Company in the amount of $23,877.47. No notations were found on this voucher copy of the check. However, page 21 of the Gaziano file reflected an adding machine tape bearing the following figures: $26,855 plus $23,877.47 equals $50,732.47. The adding machine tape equaled the totals allocated to G.S. and G.T. along with the miscellaneous entry of $732.47, which was found in handwritten notation on check number 59469, payable to Clinton Fuel Company, Inc.

On page 26 of the Gaziano file, an S&T check number 60440 dated October 13, 1977, made payable to Joki Coal Company, RD #5, Finleyville, Pa., in the amount of $42,982.13 was noted along with the handwritten notation of $500.00 Don Wright.

On October 27, 1977, three S&T checks were issued totalling $97,145.70. Check number 60861 was made payable to Davis Coal for $25,718.90 and can be found on page 31. Check number 60859 in the amount of $23,892.30 can be located on page 32, but the payee cannot be identified due to the poor quality of the copy. The third check can be located on page 33, number 60860, in the amount of $47,534.50, and adding machine tape obliterates the payee on this voucher copy, but the adding machine tape totals the three previously mentioned checks, noting the amount of $97,145.70. On pages 29 and 30 of the Gaziano file, two cashiers' checks from the Second National Bank of Masontown, numbers C 50787 payable to George Solomon dated October 28, 1977, in the amount of $23,000 was found in the Gaziano file. The correlation to be drawn here is that the three previously mentioned checks were written on October 27, 1977, and the two cashier's checks were issued from the Second National Bank of Mason-

town on October 28, 1977, and all five documents appear in sequence in the Gaziano file, pages 29 through 33.

On page 31 of the file, an S&T check number 59744 dated September 6, 1977, was issued to the Davis Coal Company in the amount of $18,911. On page 42, S&T check number 59745 dated September 6, 1977, was issued to the Clinton Fuel Company, Inc., in the amount of $17,909. On page 43, an adding machine tape appears stapled to check number 59745 totalling the two aforementioned checks, $36,820. Handwritten notations on the adding machine tape reflect the following: 30,000.00 J.A., 5000.00 C.Y., 1000.00 Conner. If the $30,000 to J.A. and the $5,000 to C.Y. and the $1,000 to Conner are subtracted from the $36,820 total of the two aforementioned checks, a balance of $820 is noted.

On page 53 of the Gaziano file, we found the left half of a Solomon and Teslovich check to Clinton Fuel and Transport Company, •RD #1, Box 66A, Saxonburg, Pa., noting a partial sum to be paid of "33,2. . . ." The voucher copy of the check contained a handwritten notation "Anderson $25,000.00 to." On page 54 of the Gaziano file appears the right half of the S&T check totalling $33,269. The check is not dated but the handwritten notation appears in the center of the voucher copy ". . arch 30 1977." Assembling the two sides, the handwritten notation appears to state "Anderson $25,000.00 to (M)arch 30 1977."

Page 64 of the Gaziano file reflects an S&T check number 55803 dated February 25, 1977, to Walters Tire Service in the amount of $8,655.67. In the center of the voucher copy of the check is reflected the following handwritten notations: "1/2 GS 1/2 GT."

On Page 72, we found a voucher copy of an S&T check number 59789 dated September 8, 1977, payable to Robert

Rathway Trucking, Perryopolis, Pa., in the amount of $3,000. Handwritten notations on the voucher copy were as follows: 2500.00 Arnie, 500.00 Misc. The two handwritten notations equal the total of the check which was made payable to Robert Rathway Trucking.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

— — —

THE UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
versus	)	Criminal Action
	)	No. 82-171
GEORGE A. SOLOMON,	)	
GEORGE R. TESLOVICH and	)	
GEORGE M. TESLOVICH, JR.,	)	
	)	
Defendantss.	)	

— — —

TRANSCRIPT OF THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW AT PITTSBURGH, PENNSYLVANIA, ON WEDNESDAY, JANUARY 19, 1983.

— — —

BEFORE: DONALD F. ZIEGLER, United States District Judge.

APPEARANCES:

J. ALAN JOHNSON and
FREDERICK W. THIEMAN,
633 U.S. Post Office & Court House,
Pittsburgh, Pennsylvania, 15219
appearing on behalf of The United States of America.

FREDERICK D. FAHRENZ,
Preiser & Wilson,
P.O. Box 2506,
1012 Kanawha Boulevard, E.,
Charleston, West Virginia, 24329
appearing on behalf of George R. Teslovich.

STANLEY GREENFIELD,
728 Fifth Avenue,
Pittsburgh, Pennsylvania, 15219
appearing on behalf of George A. Solomon, Defendant.

STANLEY M. STEIN,
707 Law & Finance Building,
Pittsburgh, Pennsylvania, 15219
appearing on behalf of George M. Teslovich, Jr.,
Defendant.

— — —

PROCEEDINGS

THE COURT: Good morning, ladies and gentlemen.

This is the case of the United States of America versus George A. Solomon, George R. Teslovich and George M. Teslovich, Jr., at Criminal Action No. 82-171, and the following shall constitute the Findings of Fact and Conclusions of Law.

No. 1. Presently before the Court are the motions of George A. Solomon, George R. Teslovich and George H. Teslovich, Jr., to suppress the evidence and dismiss the indictment. We will treat all issues as they pertain to all Defendants since all Defendants have joined in the motions.

No. 2. The first issue that we must resolve is whether the delivery of documents to the F.B.I. by Henrietta

Foster, the opening of two folders and the delivery of copies to a governmental agent somehow implicates the Fourth Amendment and, if so, whether exigent circumstances obviated the need to obtain a search warrant. We hold that the issue is controlled by the United States vs. Valen, 479 F.2d, 467, Third Circuit, 1973. See also Meister vs. CIR, 504 F.2d, 505, Third Circuit, 1974.

No. 3. The record establishes no governmental involvement in the procurement of records later determined to encompass the years 1976 and 1977. The documents were given to Ms. Foster by Phillip Gaziano. She delivered the envelopes to the United States on her own on July 17, 1979. We also find no governmental involvement in the opening of the records so as to implicate the Fourth Amendment. The envelopes were opened and copied by Ms. Foster after a Federal prosecutor and an agent refused to even touch the folders. We find that use of a photocopying machine at the Federal Bureau of Investigation by Ms. Foster and the supplying of two duplicate envelopes by the Bureau does not constitute governmental involvement so as to implicate the Fourth Amendment. Ms. Foster was at no time an agent of the United States or acting at its behest or direction. This was a private search and seizure. Or stated another way: It was evidence obtained by the United States from an independent source. United States vs. Valen, supra; Burdeau vs. McDowell, 256 U.S. 465, 1921.

No. 4. Even if we assume, arguendo, governmental seizure when the copies were delivered to Agent Geitgey, and assuming further that Defendants have standing to raise the issue, we find that exigent circumstances preclude the necessity of a search warrant. Time was of the essence when Ms. Foster appeared at the Federal Bureau of Investigation in the afternoon of July 17. She had been in-

structed by Gaziano to retrieve the documents forthwith, and her appearance in Pittsburgh gave her only a brief period to copy the documents and return them to her employer. Insufficient time was available to secure a warrant under the circumstances, and, thus, we find that exigent circumstances permitted Agents of the United States to assist in copying the documents, receive the copies and review them in due course. As we have noted, however, there was no search or seizure within the ambit of the Fourth Amendment because we find the search and seizure to be private in character, and the United States vs. Walter, 447 U.S. 649, 180, is not to the contrary. Accordingly, the contention of Defendants in this regard must be denied.

No. 5. The next question we must resolve is whether the search warrant signed by a Federal Magistrate on December 18, 1979, is based on probable cause. We find by examining the affidavits, the appendix and Exhibit 1, that the warrant was based on such cause. First, it is important to note that the Magistrate made his finding of probable cause based on the affidavit, the appendix and Exhibits. The affidavit refers to the appendix, and the appendix refers to the records marked here as Exhibit 1. The law is clear that the Magistrate may refer to such an attachment if they are referred to in the affidavit, as here.

No. 6. The most recent discussion of probable cause to obtain a search warrant is addressed in United States vs. Alfonso, No. 82-1064, Third Circuit, 1982. There, the Court of Appeals rehearsed the test of reliability and knowledge set forth in Aguilar and Spinelli. Applying these precepts, we find that the reliability and knowledge of Henrietta Foster was corroborated by subsequent investigation as recited in the affidavit so as to authorize a finding of probable cause by the Magistrate. The two-pronged test of Federal law has been satisfied. See United States vs. Bush, 647 F.2d 357, Third Circuit, 1981.

No.7. Our finding of probable cause is based on the following high-lighted facts as set forth in the affidavit:

(A) Henrietta Foster was employed by Suncrest Enviromental Resources, Inc., as a secretary-bookkeeper;

(B) Phillip Gaziano was the President and owner of Suncrest and the son-in-law of George Teslovich;

(C) Gaziano worked as an accountant for Solomon & Teslovich, Inc., until November of 1977;

(D) George Solomon and George Teslovich were co-owners of Solomon & Teslovich, Inc.;

(E) In November of 1977, Gaziano gave Henrietta Foster two manila envelopes and stated that they contained records of business transactions of Solomon & Teslovich, Inc., which occurred while Gaziano was employed by that company.

(F) Gaziano further stated that the records were hot and very incriminating to S&T. Also, if the records got into the wrong hands, they could cause a fire;

(G) Gaziano told the Federal Bureau of Investigation that while at Solomon & Teslovich, Inc., he learned every phase of the company's operations;

(H) Henrietta Foster delivered the records to the Federal Bureau of Investigation, and copies were made relative to the years 1976 and 1977;

(I) The records were reviewed by Federal Agents and found to relate to S&T and Redstone Hauling Company;

(J) Notations along the check stubs and ledger sheets indicate that checks were not paid to the actual payee but rather to individuals identified by name or initials on the stub or ledger sheet;

(K) The names and initials on the ledger sheet and check stubs indicate payments to George Solomon, G.S.,

G. Teslovich, G.T., J.A., Anderson, Yurick, C.Y., Conners and T. Pecura;

(L) Contacts by Federal Agents with an official at United States Steel Corporation established that S&T and a subsidiary had contracts with United States Steel, and that John Anderson and Charles Yurick were at that time employees of United States Steel in areas involving S&T's contracts with Steel;

(M) The names J.A., C.Y., Yurick and Anderson appear on the disbursement sheets of the reviwed records, and Anderson's name appears in a telephone book of Gaziano;

(N) Further contact by the Fedeal Bureau of Investigation revealed that a Conners worked for PennDot in Highway Construction, and a similar name, namely Conners, appears in the disbursement sheets;

(O) S&T had one large highway construction project with PennDot;

(P) Tom Pecura is Business Manager of Laborers Union Local 1508, and George Solomon stated to a Federal Agent that he uses union labor and often deals with Tom Pecura of the Local;

(Q) The names Anderson, Conners and Arnie appear on check stubs issued to either Rathway Trucking or Clinton Fuel and Transportation Company, but contact with those companies by the Federal Bureau of Investigation indicated that no one by those names had ever worked there;

(R) An interview of an employee-teller of the Second National Bank of Masontown, Pennsylvania, revealed that an individual who was known to the teller as an employee of S&T appears at her window in the bank and cashes S&T checks payable to other companies;

(S) The checks contained scribbled endorsements and the amounts so large the teller often was required to obtain additional funds from the vault;

(T) Redstone Hauling Company and S&T shared corporate offices near the town of Masontown; and,

(U) A Federal Agent observed corporate records in filing cabinets of the corporate office building of S&T, a building also shared by Redstone Hauling, the same company for all purposes according to George Solomon.

No. 8. We find the selected facts taken from the affidavit and attachments permit a finding by the Magistrate of probable cause. First, we note that the type of citizen knowledge of Henrietta Foster, based on her employment with Suncrest, Gaziano's admissions to her, the records she supplied, the details contained therein, and the manner in which she received secreted documents, makes this case distinct from one involving a hearsay statement from an undisclosed confidential informant. Here the requisite reliability is apparent. See United States vs. Harris, 403 U.S. 573, 590, 1970.

No. 9. Henrietta Foster was employed by a person who was in a position to gather written documents that were incriminating to S&T. She is named and her position is identified. Gaziano is also named and his position with S&T was identified. Further, the manner in which she received the envelopes and their secretive detailed nature are relevant to whether the Magistrate could credit her information. The statements by Gaziano to her are clearly declarations against his penal interest, and her statements to the F.B.I. may be to the same effect since she had received stolen property and knowingly concealed a possible Federal crime. See Jaben vs. United States, 381 U.S. 214, 224, 1964. We find that the Magistrate properly found Henrietta Foster to be reliable and credible.

No. 10. The fact that Henrietta Foster had not given previous information to a police agency is not critical in light of the corroborating information. Harris vs. United States, 403 U.S. 573, 1970; Jones vs. United States, 362 U.S. 257. Here the supporting information is substantial. The employment of persons in sensitive positions of companies and agencies that did business with S&T; the statements of Brenda Royster to the Federal Bureau of Investigation; the fact that certain names of persons appeared in the records, and those persons did not work at Rathway Trucking or Clinton Fuel; and the records themselves in great detail tend to establish believability and perhaps knowledge so as to establish probable cause to believe that a pattern of commercial bribery was taking place at S&T.

No. 11. It must be noted that the Magistrate was not presented only with the hearsay declarations of Henrietta Foster. Henrietta Foster also produced records, and the Magistrate had the benefit of the detailed analysis of those records by Federal Agents. Hence, to repeat, this is not a case in which a warrant was based on the uncorroborated hearsay declarations of a confidential informant without more. Moreover, as was stated in United States vs. Alfonso, corroboration is necessary only in the absence of a statement detailing the manner in which the information was gathered.

No. 12. The Court of Appeals in the United States vs. Alfonso addressed the requirement that the affidaivt contain facts sufficient to demonstrate that the informant based his conclusions on adequate knowledge. The Court held that an informant may derive such information through direct observation or an "equally reliable means." Citing United States vs. Busch, 647 F.2d 357, 362, Third Circuit, 1981. Can there be any more equally reliable

means than business records obtained by an accountant who worked for a company and who admits the records are hot and incriminating? That these are business records of S&T is plain, and we are satisfied that by reviewing the affidavit and attachments the Magistrate properly arrived at the conclusion that there was probable cause to believe that a patttern of bribery existed so as to issue this search warrant.

No. 13. It is helpful to remember that the Magistrate was dealing with probability. Was it probability that Henrietta Foster was telling the truth? Were there enough facts to determine to a probability from her statements the records and subsequent investigation that a pattern of commerical bribery existed at S&T? We answer both questions in the affirmative. This case is much stronger than United States vs. Bush, 647 F.2d 357, and there the Court of Appeals upheld the warrant finding sufficient evidence of veracity and knowledge.

No. 14. We cite for Counsels' review Footnote 5 of Bush which reads as follows: "A legitimate basis of knowledge means in general that the informant either directly observed the critical facts or that he obtained those facts directly from one of the participants in the criminal enterprise who by revealing those facts made an admission against penal interest." Citing United States vs. Harris, 403 U.S. 573. See also LaFave at 3.3(e). We find that the records, Gaziano's statements, and the subsequent corroboration of Henrietta Foster's veracity and information, are sufficient to satisfy probable cause. United States vs. Bush.

No. 15. We now turn to the question of staleness. Defendants contend that the records relate to alleged conduct that transpired in 1976 and '77, and, therefore, the in-

formation cannot serve as the basis for a search warrant issued on December 17, 1979. Defendants contend that the Magistrate had no reason to believe that a pattern or practice existed in 1976 or '77, and, more importantly, that it continued. We disagree. First, the records delivered to the Bureau of Investigation established a pattern, and, further, that entry of the payments in the records occurred after the payment was made, thus, although Exhibit 1, Page 63, deals with miscellaneous income for 1976, and Exhibit 1, Page 56, recites April 19, 1976, we believe that a pattern was established for 1976 and 1976 plus the preceding and succeeding years.

No. 16. The question of whether there was sufficient evidence for a magistrate to conclude that a pattern of bribery was continuing is resolved by the investigation of the Bureau of Investigation. Ms. Foster delivered the records to the Bureau on July 17, 1979, and the matter was presented to the Magistrate of this Court on December 18, 1979. Actually, it was presented the day before, and, as I understand it, he rejected the first affidavit. He signed it, however, on December 18, 1979. Most of the investigation here took place in the Fall of 1979, but the precise date is not important. Rather, the facts developed are important and especially the statements of the teller at Second National Bank. Thus, the Magistrate had evidence that S&T was doing business with certain companies and PennDot; that persons whose names and initials appear in the records were employed in sensitive positions with these entities from July 17, 1979, to at least December 18, 1979; that checks were drawn to persons who did not work for several companies during this period; that large sums of cash were being generated during this time frame by S&T by cashing checks with vague endorsements at Second National Bank; and that business records were on the

premises of S&T in the Fall of 1979 and prior to the issuance of the search warrant.

No. 17. As the Supreme Court noted in Andresen vs. Maryland, 427 U.S. 463, 478, Footnote 9, 1976, a relatively long delay may prevent a finding of probable cause in some cases, but not in others. The facts of each case determine the outcome. The key in our judgment is whether a pattern is evident or merely an isolated incident. See U.S. vs. Forsythe, 560 F.2d 1127, 1132, Third Circuit, 1977.

No. 18. Consistent with the ad hoc approach to this issue are the following authorities: United States vs. Brinklow, 560 F.2d 1003, Tenth Circuit, 1977, in which 11 months was not found to constitute staleness; United States vs. Scott, 535 F.2d 522, Fifth Circuit, 1977, in which a period of nine months to two years and nine months was found not to constitute staleness; and United States vs. Rahn, 511 F.2d 290, Tenth Circuit, 1975, in which two years was found not to constitute staleness. And in the United States vs. Rahn the Court held that weapons held and observed in a location two years before established probable cause. Here we find that the Magistrate was presented with sufficient facts to conclude not only that a pattern of bribery was continuing, but also that the records seized by Gaziano were on the premises when the affidavit was filed. First, we are dealing with corporations and business records; second, the records seized were business records; third, companies are required to maintain records for tax purposes and to continue the ordinary course of business; and, fourth, there is no direct or definite evidence that Gaziano destroyed these records rather than returning them once the investigation of Suncrest began. In sum, as in Aldreson vs. Maryland at Page 479 and Footnote 9, we find that there was probable cause to believe that such records would be maintained in the of-

fices of S&T for the period of time in question, particularly in light of the wide-ranging and sophisticated nature of this alleged scheme of bribery.

No. 19. Defendants next contend tht the warrant authorized the seizure of so many kinds of records in such broad language and for such a lengthy time period that the warrant is general, and, therefore, Constitutionally infirm. We disagree.

No. 20. With regard to the time period, to-wit, 1975, to December 18, 1979, we find that the evidence established probable cause for the Magistrate to conclude that the activities encompassed this period. The analysis of the records for 1976 and '77 reveals that the entries were made on some occasions after the fact. Thus, a document bearing the date 1976 could relate to a transaction in 1975, especially when considering the nature and reasons for the payment. Prospectively, we find that the Magistrate had probable cause to believe the scheme was ongoing for the reasons rehearsed.

No. 21. With regard to the types of records to be seized, that is, specificity, we are satisfied that this is not a general warrant. See United States vs. Johnson, 690 F.2d 60, Third Circuit 1982. That case upheld language much more imprecise than the language here. Here we have a case involving corporate records involving commercial bribery. The records used in the ordinary course of business were the records used to generate cash, record the payments and mask the alleged scheme. Therefore, it is not a case in which the United States was seeking a specific instrument used to commit a crime or a particular solvent or precursor or drug as in the routine csae.

No. 22. Even a cursory review of the records attached to the affidavit and marked Exhibit 1 indicates the dif-

ferent types of records probably used in this scheme: checks, tax records, ledgers, calculator data, check stubs, vouchers, memoranda, longhand notes, bills, statements, invoices, settlement sheets, and cashier's checks. Many with cryptic notes attached are included. All are business records of S&T, or one of the offices. All are used in the ordinary course of business. Thus we find nothing indefinite in light of these documents and the pattern of activity previously rehearsed so as to prevent seizure of business records of S&T limited to cash receipts and disbursement journals and ledgers, checks, wire transfers, books of account, in addition to any other writings pertaining to S&T, Inc., which reflect payments to agents of unions, United States Steel, PennDot, or other business or governmental entities. We find that the warrant does not permit the seizure of one thing under the warrant describing another. The warrant describes in both specific and inclusive generic terms what was to be seized. And by using the term "all," the Magistrate, rather than the F.B.I., determined what was to be seized. The final sentence is also sufficiently specific in our judgment. See Andresen vs. Maryland, 427 U.S. 460, 470-77. Defendants' contention will be denied.

No. 23. Defendants next argue that some of the records actually seized were not authorized by the warrant. This is a case involving, apparently, approximately 4,000 exhibits, and, therefore, the Court has not as yet benefited from the industry and imagination of the able lawyers in this case. Therefore, the Court is ordering Counsel to review every exhibit that the United States will offer as evidence at trial within seven days. On Wednesday, January 26, 1983, we will resume this hearing to determine whether there is any merit to Defendants' contention that particular items were seized without the ambit of the war-

rant. In short, I assume that most of the exhibits can be resolved by stipulation. As to those that cannot, we will receive appropriate evidence on this issue and determine whether individual exhibits must be either suppressed or returned to the Defendants.

No. 24. Defendants also argue that failure to include the affidavit with the warrant violates a Federal Criminal Rule and requires that all evidence be suppressed. Defendants rely on United States vs. Roche, 614 F.2d 6, First Circuit, 1980, but that reliance is misplaced. In Roche the Court found that the warrant was too broadly worded, and the affidavit, which was not referred to in the warrant, or served with it, could not cure the defect. Here, as we have found, the warrant was specific; it was not too broadly worded so as to permit the seizure of any item at the whim of the Federal police. Thus, the failure to supply the affidavit was immaterial and certainly does not require suppression of the evidence. In addition, the United States supplied a plausible reason for not providing the warrant, and we find no reason to conclude that the failure to literally comply with a Rule of Criminal Procedure under the circumstances requires suppression or dismissal. Defendants' motion will be denied.

No. 25. The motion of the Defendants to suppress will be denied in all respects with the exception of the one remaining issue, and that will be heard on Wednesday next if Counsel are unable to resolve the issue by stipulation based on The teachings of Andresen vs. Maryland, 427 U.S. at 482, Footnote 11.

No. 26. With regard to the other motions, we will address them first as filed on behalf of George M. Teslovich, Jr., by his able lawyer, Stanley Stein:

(A) The motion to suppress is denied with the exception

of the single issue previously discussed which will be heard next Wednesday;

(B) The motion to dismiss the indictment alleging conspiracy and the aiding and abetting counts is denied. There is no basis in law or fact for such relief. For example, merely because this Defendant is not mentioned in an overt act is of no significance if he was a member of the conspiracy or aided and abetted as alleged. The fact that he was not an employee or officer is also not dispositive. The indictment is in proper form, and the Defendant must await proof by the United States. If the evidence is wanting, Defendant is entitled to relief when the Government rests its case;

(C) The motion of George M. Teslovich, Jr., to inspect Grand Jury minutes is denied. The indictment is in proper form, and this is an attempt to secure pretrial disclosure of witnesses which is not required under the circumstances;

(D) The notion for a Bill of Particulars is denied. The Defendant has been advised as to each exhibit to be produced by the United States at trial, and the indictment is specific and meets the three-pronged test so as to adequately advise the Defendant of the charge and to afford him a basis for a defense, and to prevent any subsequent prosecution for the same crime;

(E) This Defendant's motion to require the United States to disclose the manner of selecting the Grand Jurors is denied because Defendant has failed to allege or advance by evidence or otherwise any allegation of impropriety;

(F) Defendant's motion for disclosure of mail cover has been resolved and is now moot;

(G) Motion to identify evidence secured by mail cover

has been withdrawn, as we understand it, by agreement since no such seizure occurred;

(H) The motion for inspection and discovery of exculpatory material is granted to the extent that the United States shall comply with Brady vs. Maryland. It is in all other respects denied;

(I) This Defendant's motion for identity of witnesses prior to trial is denied;

(J) The motion to interview United States witnesses is granted, if they desire to converse with Counsel, but only after they have testified on Direct Examination;

(K) The motion for a pretrial list of witnesses is denied;

(L) The United States is ordered to turn over to Counsel all Jencks Act Grand Jury material, rap sheets, leniency grants, immunity considerations, and plea-bargain arrangements to Defense Counsel after selection of the jury unless on an individual-witness basis the United States convinces this Court that good cause is established to withhold such information until the witness testifies on Direct Examination;

(M) The motion for additional preemptory challenges is deferred until trial;

(N) The motion to disclose information as to prospective jurors is denied;

(O) The motion to disclose informers will be granted to the extent that any informer not called by the United States as a witness shall be divulged when the United States rests its case. We find no good cause, need or other basis on this record to adopt a distinct approach. Most informers here we assume are witnesses or employees or associates and they are not informers in the classic sense of

the word. And our approach, therefore, meets the ends of justice.

(P) The motion to sever will be denied based on the teachings of the United States vs. Boscia. There is no evidence on this record that any co-defendant will testify, or is willing to testify, or will supply exculpatory evidence, because Defendants have failed to file the necessary affidavits. Therefore, judicial economy becomes a factor in this three-to-five-month trial;

(O) The request for individual voir dire is deferred until trial.

No. 27. We will also treat the rulings that we have just made in finding No. 26 as applying to George A. Solomon and George Teslovich rather than reviewing each of the motions that they have filed. The motions have been granted or denied or deferred as to each Defendant as we have found, and a written order will follow.

Now, George R. Teslovich has filed several other motions. First of all, he contends the indictment is vague and must be dismissed. We disagree. The indictment is in proper form. It properly advised the Defendant of that which he must meet, and we see no vagueness which would raise Constitutional or other implications. Therefore, the motion will be denied.

George R. Teslovich has indicated tht he desires an extension of the Speedy Trial Act. This Court intends to enter an order to make certain that all of the period of time following the filing of the motions up to the present day, and continuing in the future, since we have an unresolved motion, is excluded from the provisions of the Speedy Trial Act. We will address next Wednesday when

we resume this hearing the question of when the trial itself will actually begin.

George R. Teslovich has filed a motion to produce Grand Jury minutes. That motion is denied. Such a production is only warranted upon a showing of exceptional circumstances, and there is no such allegation in this case, or proof thereof.

Mr. George R. Teslovich has also filed a motion concerning wire interceptions. There is an affidavit of record indicating that no wire interceptions were employed by any agency of the United States in this case. Mr. George R. Teslovich has filed a motion for severance. That motion is denied because, one, there are no affidavits of record indicating that the other Defendants will testify; secondly, there are no affidavits of record indicating that if they did testify their testimony would be exculpatory, and, therefore, a factor of judicial economy in the lengthy trial which becomes important.

Lastly, there is a motion filed by George R. Teslovich to strike a portion of the indictment as being irrelevant and improper under the Federal Rules of Criminal Procedure. We have reviewed that in detail and find that motion to be without merit.

Gentlemen, have I overlooked anything?

Now, will this period of time give you sufficient time to review these 4,000 exhibits and advise me concerning the future course of events?

MR. GREENFIELD: Will what Your Honor just read be promulgated in some written form?

THE COURT: No, sir. I will enter an Order as I do, but my Findings are always read right into the record.

MR. GREENFIELD: Okay.

MR. STEIN: The United States Attorney, Your Honor, will, I think, advise us, and I am not sure whether we have any documents that already indicate which of the documents, which of the 4,000 exhibits, were in fact seized in the execution of the warrant. I think it will reduce the number of documents that have to be reviewed.

THE COURT: all right sir.

Mr. Thieman, can you do that within the period I have indicated?

MR. THIEMAN: I don't know if we could do it in written form. We would be glad to sit down with Counsel and indicate as the things are reviewed what are search and what are not search.

THE COURT: Then you can make a record as you are doing that, too.

MR. THIEMAN: Yes.

THE COURT: All right.

MR. GREENFIELD: Your Honor, at the time I made argument to you, I indicated that I wanted the opportunity to place of record as part of the factual development of the case, the indication that the records were in fact destroyed, the ones that were returned to Mr. Gaziano, and that the Government knew that. Your Honor in his opinion indicated that there is no evidence of record to that effect.

THE COURT: No definite evidence . That is correct. I think that is right.

MR. GREENFIELD: And you gave me the right to place that of record, and I want to do that perhaps by next

week. The Government knows they were destroyed, has evidence to that effect, and that is our information as well.

THE COURT: Very good. Perhaps you can prepare a written stipulation, and it will be signed if that is the fact.

MR. GREENFIELD: Presumably that won't change your ruling since one of the bases for that ruling on Point 20, whatever it was, was that there was no such evidence. It is important to us that the record be clear on that.

THE COURT: Those findings in that Finding, that is right, were in the disjunctive.

Anything else?

All right. Well, then, we will recess on this until Wednesday next at 10:00 A.M., at which time whatever you have to produce you may do so. We will then also discuss a specific trial date which will come quickly thereafter.

MR. STEIN: Counsel for Defendants have previously discussed among themselves — and whether or not it is appropriate today or next Wednesday I do not know — but we have discussed a request of the Court to certify some or all of the suppression questions here to the Third Circuit for appeal inasmuch as this trial is going to be lengthy.

THE COURT: That motion is denied. The Court of Appeals has enough work to do without certifying questions which really are rather routine. The teachings from the Court of Appeals addressed this issue, if you look at them carefully. And if judgment is ultimately entered in this case, there is sufficient time for the Court of Appeals to address them. It is not my practice to certify questions at all, but I will concede that if the appropriate case came along, I would certify. This is not that case.

Now, I am also mindful that Mr. Preiser has a bench trial of a few days; that this case may occasion a conflict; is that true?

MR. FAHRENZ: Again, Your Honor, as I told you in our informal conference that I would do, I would relate now to the Court that trial has been continued.

THE COURT: That has been continued?

MR. FAHRENZ: Right.

THE COURT: Then we have Mr. Greenfield, who has a case before Judge Diamond that we want to try to work around.

MR. GREENFIELD: Yes. I am sure we can do that, but that is between you and Judge Diamond. Next week I think we can work around another matter, but Judge Mansmann has me scheduled to continue a previously started, obviously non-jury civil case.

THE COURT: Did she give you a date?

MR. GREENFIELD: She said Monday the 24th. I am going to confirm that today. How many days beyond that it will go, that is whether through the 26th, which is when you asked us to convene, I don't know. Or, in any event, we can take a recess and come here. I don't know how long we would be here, in any event, probably not all that long, and I can still continue with that.

THE COURT: She called me about that, as a matter of fact. I don't recall the date she did. But Monday next –

MR. GREENFIELD: – the 24th.

THE COURT: – you have to be before her?

MR. GREENFIELD: We will see you on the 26th, but I assume the matter with you will not take all day. I

shouldn't think it would. And if I am still in session with her, we will just recess, I assume, or I hope we can, for your purposes. In any event, would you coordinate that with her?

THE COURT: Oh, yes, absolutely. I just don't want a lot of people coming in from out of town and the hearing not being held on the day we indicated. Perhaps it might be wise to move this back one day then to Thursday. That will give you more time, and we can resolve those matters and hopefully you can have that over before Judge Mansmann. We will set it up, then, for a week from tomorrow here at 10:00 o'clock for any remaining, unresolved matters.

Anything else?

Thank you very much.

(Whereupon, the proceedings were concluded.)

CERTIFIED TRUE AND CORRECT TRANSCRIPT.

/s/ Colvin G. Vogel
COLVIN G. VOGEL, Official Reporter

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Nos. 83-1231 and 83-1291

In the Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE R. TESLOVICH, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE A. SOLOMON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the search warrant in this case was supported by probable cause.

2. Whether the search warrant's description of the things to be seized satisfied the particularity requirement of the Fourth Amendment.

3. Whether the seizure of certain records belonging to petitioners' accountant violated any of petitioners' rights under the Fourth Amendment.

4. Whether the alleged failure of the agents executing the warrant to prepare an adequate inventory of the items seized required suppression of the evidence.

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UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the court of appeals (Pet. App. 3a-6a)[1] is reported at 725 F.2d 671. The oral findings of fact and conclusions of law of the district court denying petitioners' motion to suppress evidence (Pet. App. 25a-46a) are unreported.

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[1]"Pet. App." refers to the Appendix to the Petition in No. 83-1231.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1983 (Pet. App. 1a-2a). The petition for a writ of certiorari in No. 83-1231 was filed on January 25, 1984, and the petition for a writ of certiorari in No. 83-1291 was filed on January 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The petitioners, George A. Solomon and George R. Teslovich, entered conditional guilty pleas to charges of income tax evasion, in violation of 26 U.S.C. 7201. Solomon was sentenced to seven years' imprisonment and a $30,000 fine. Teslovich was sentenced to five years' imprisonment and a $30,000 fine. The court of appeals affirmed petitioners' convictions after rejecting their challenge to the district court's denial of their motion to suppress evidence seized from the offices of Solomon & Teslovich, Inc. (Pet. App. 4a-6a).[2]

1. The government's application for the search warrant at issue in this case was supported by an affidavit dated December 18, 1979, from Richard R. Geitgey, a Special Agent of the Federal Bureau of Investigation (Pet. App. 11a-17a). Geitgey represented that information regarding Solomon & Teslovich, Inc. had come to his attention while he was investigating a scheme involving commercial bribery and fraud on the part of Suncrest Environmental Resources, Inc. (SERC) and its owner, Phillip Gaziano. Henrietta Foster, an employee of SERC and secretary to Gaziano, admitted to Geitgey that she had taken part in the scheme.

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[2]The court of appeals also affirmed the conviction of petitioners' co-defendant, George R. Teslovich, Jr. The younger Teslovich, who received a sentence of three years' imprisonment with all but 179 days suspended, a $10,000 fine, and three years' probation with a requirement of community service, has not sought review in this Court.

She said that Gaziano had instructed her to prepare and cash forged checks. Gaziano then used the money to pay off one Alfred Royster, Jr., an employee at a power plant that purchased coal from SERC. In return, Royster would manipulate coal samples so that SERC would be paid more than its coal was actually worth. *Id.* at 11a-12a.

Geitgey personally interviewed Gaziano, who said he barely knew Royster. It was established through a travel agency, however, that Gaziano sent Royster on a trip abroad paid for with SERC funds. An official at the Hatfield Power Station confirmed that Royster was in a position to manipulate coal samples and had been under suspicion for that type of activity. In monitored conversations, Gaziano attempted to persuade Foster to refrain from mentioning Royster when she appeared before a grand jury. Pet. App. 12a-13a.

Gaziano told Geitgey that, prior to October 1977, he had worked as an accountant for Solomon & Teslovich (Pet. App. 13a). As Geitgey further related in the affidavit (*id.* at 13a-14a):

> 7. Henrietta Foster also stated that in November of 1977, when she first became employed for Gaziano as a secretary-bookkeeper, Gaziano gave to her two manila packages, which Gaziano told Foster contained records of Solomon and Teslovich, Inc., business transactions, which occurred while Gaziano was employed at S and T. Gaziano explained to Foster that the records were "hot" and were very incriminating to S and T. Gaziano went on to explain that if the records got into the "wrong hands", the records could cause a "fire".
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> 8. Henrietta Foster further stated that Gaziano was very concerned about the FBI's inquiries pertaining to the operations of SERC and on July 17, 1979, asked Foster to retrieve the records, which she had been

keeping for Gaziano, pertaining to S and T. Foster explained to Gaziano that the records were at the home of her son in Oil City, Pa. and that it would take at least one day to retrieve the records. Gaziano instructed her to retrieve the records and return them to him for destruction.

9. I was able to verify the existence of Gaziano's "hot" records of S and T when Henrietta Foster voluntarily produced the records for the undersigned. In my presence, the two packages were opened, and documents pertaining to S and T and Redstone Hauling Co. were reflected throughout the two packages. Those records pertaining to 1976 and 1977 were copied in my presence and then returned to Ms. Foster who stated she returned them to Gaziano.

The affidavit went on to explain that Geitgey and Special Agent Thomas Powers, an accountant, had examined the records produced by Henrietta Foster. They found notations on ledger sheets and check stubs indicating that money was distributed to persons other than the named payees. Some of the names or initials noted corresponded to the names or initials of individuals holding responsible positions in entities with which Solomon & Teslovich did business, such as United States Steel Corp., the Pennsylvania Department of Transportation, and Laborer's Union Local 1308. Pet. App. 14a-16a.

The affidavit further stated (Pet. App. 16a) that:

16. I interviewed Brenda Royster of the Second National bank of Masontown who is a teller at said bank and who stated to me that an individual by the name of Pat Burns who is known to her as an employee of S and T appears at her teller window and cashes S and T checks payable to other companies — with scribbled endorsements — in amounts so large that the teller often has to get additional cash from the vault.

Special Agent Geitgey concluded his affidavit by expressing the belief that Solomon & Teslovich, Inc. was engaged in conduct in violation of 18 U.S.C. 1962(c) (Pet. App. 17a). Attached to Geitgey's affidavit was Special Agent Powers' detailed description of the records produced by Henrietta Foster (*id.* at 18a-24a). Also attached were copies of the records that had been examined (Solomon App. 55a-126a).[3]

Initially, the affidavit of Special Agent Geitgey was submitted to a magistrate without the statement of Special Agent Powers or copies of the Foster documents. The magistrate declined to issue a warrant solely on the basis of the affidavit. He requested Agent Powers' summary of the records and the documents themselves, examined them overnight, and then issued the warrant (Teslovich App. 251-252).

2. Petitioners moved to suppress the evidence seized pursuant to the search warrant and to dismiss the indictment against them (Pet. App. 26a). After a hearing on the motion to suppress, the district court concluded that Foster's statements to the investigating agents, together with the copies of apparently incriminating records that she provided to them and the information Special Agent Geitgey obtained from other sources corroborating numerous details shown by the Foster records, established probable cause to believe that a pattern of commercial bribery existed at Solomon & Teslovich (*id.* at 32a-33a). The court further found that the warrant sufficiently described the documents to be seized in light of the fact that the affidavit and its supporting documentation showed the existence of an extensive scheme to generate cash by fabricating records maintained in the ordinary course of business, recording the

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[3] "Solomon App." and "Teslovich App." refer to the Record Appendices filed by petitioner Solomon and co-defendant George M. Teslovich, Jr., respectively, in the court below.

payment of numerous bribes with cryptic notations on a wide variety of documents, and concealing the improper payments by scattering fictitious payments to suppliers through the accounting records of the business (*id.* at 36a-37a). Accordingly, the district court concluded that the search of the offices of Solomon & Teslovich on December 19, 1979, was lawful, and it denied petitioners' motion to suppress the evidence seized in that search (*id.* at 38a). The court of appeals affirmed in an unpublished opinion (*id.* at 4a-6a).

ARGUMENT

The court of appeals correctly decided the issues presented. Its unpublished decision does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

1. Both petitioners contend (83-1231 Pet. 5-11; 83-1291 Pet. 16-27) that the warrant to search the offices of Solomon & Teslovich was not supported by probable cause. Both petitioners assert that, since Foster was not an employee of Solomon & Teslovich, but rather claimed to have learned about its affairs, including the alleged bribery scheme, while she was an employee of SERC, an independent company, the affidavit failed to demonstrate that she had an adequate basis of knowledge for her statements that the sealed records that had been given to her by her supervisor, Phillip Gaziano, were "very incriminating" to Solomon & Teslovich (83-1231 Pet. 7-9; 83-1291 Pet. 20-22).

In *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 15-24, this Court rejected the so-called "two-pronged test," derived from its prior decisions in *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969), for determining whether an informant's report,

together with any corroboration derived from the government's independent investigative efforts, is sufficient to establish probable cause for the issuance of a search warrant. Instead, the Court held that the existence of probable cause must be judged by the "totality of the circumstances" surrounding the informant's report and the investigation made by the government agents. *Gates,* slip op. 23.

Applying the "totality of the circumstances" test established in *Gates,* the court of appeals correctly concluded that there was probable cause to believe that the records of Solomon & Teslovich contained evidence of crimes, including commercial bribery and racketeering violative of 18 U.S.C. 1962(c). Henrietta Foster was employed by Phillip Gaziano, who, in turn, had been an accountant at Solomon & Teslovich and had married the daughter of one of its principal owners (Pet. App. 13a). While employed by Gaziano, Foster was given two envelopes allegedly containing very incriminating information concerning Solomon & Teslovich and asked to conceal the envelopes by removing them from the premises of her employer (Teslovich App. 35-39). When Gaziano gave Foster the envelopes, he told her that "they were hot, and that if they fell into the wrong hands, they could cause a fire" (*id.* at 37). Foster turned over copies of the records in the envelopes to the government (*id.* at 40, 52-55).

The FBI's analysis of the Foster records, including accountant's workpapers, showed that the proceeds of numerous checks drawn on the corporate checking account of Solomon & Teslovich were being distributed to persons other than the payees (Pet. App. 14a-16a, 18a-24a). Agent Geitgey stated in his affidavit that he was able to establish that the names associated with these payments were not the names of employees who worked at the firms to which the checks were made payable (*id.* at 16a). In addition to petitioners Solomon and Teslovich, the payees shown in the

Foster records included supervisory employees of unions, businesses, and government agencies with which Solomon & Teslovich, Inc. dealt in the course of its business (*id.* at 15a-16a). Geitgey further established that a person identified as an employee of Solomon & Teslovich frequently cashed checks payable to other companies — with scribbled endorsements — in amounts so large that the teller had to get additional cash from the vault (*id.* at 16a).

The magistrate thus was presented with a pattern of unusual transactions apparently designed to generate large amounts of cash and to make numerous cash disbursements to persons who were responsible for monitoring the performance of various types of contractual obligations by Solomon & Teslovich. It is difficult to imagine any reason why an honest businessman would conduct his business in this way, but such practices easily could be used to induce the employees of customers, labor unions, and government agencies to approve substandard work, inferior products, or noncompliance with the terms of labor contracts. In addition, the use of fictitious checks to suppliers and forged endorsements suggests that petitioners, as the principal officers and owners of Solomon & Teslovich, were trying to disguise the payments as legitimate tax deductible business expenses and to conceal the payments. These substantial indications of wrongdoing more than satisfy this Court's practical, common sense criteria for establishing probable cause under a "totality of the circumstances" analysis. See *Gates*, slip op. 15-17, 28-30.

2. Petitioner Solomon argues (83-1291 Pet. 28-36) that the search warrant in this case was overbroad and constituted a general warrant in violation of the Fourth Amendment. As the court of appeals pointed out, however, the degree of particularity required in a warrant "depends on the nature of the suspected criminal activity, the nature of the items to be seized, and the difficulty of specifying

volumes of records covering an extended period" (Pet. App. 4a-5a). See *Andresen* v. *Maryland*, 427 U.S. 463, 481 n.10 (1976); *United States* v. *Christine*, 687 F.2d 749, 760 (3d Cir. 1982). As this Court stated in *Andresen*, 427 U.S. at 481 n.10, the "complexity of an illegal scheme may not be used as a shield to avoid detection" by making it practically impossible to satisfy the Fourth Amendment requirement of particularity in the description of the records to be seized.

The search warrant in this case adequately described the things to be seized. In addition to the limitations in the warrant itself with respect to the dates covered and the types of documents sought (see Pet. App. 7a-8a), the warrant referred to the supporting affidavit, which in turn contained a detailed description of the method by which petitioners were carrying out their alleged commercial bribery scheme, together with examples of the types of notations on the books and records of Solomon & Teslovich that were used to conceal the nature of the payments being made and to disguise them as legitimate business expenses (Pet. App. 7a-17a).[4] A warrant may contain a clause authorizing the seizure of things other than those expressly described, provided that it is clear from the context that the additional authority relates to evidence of the crime for which the issuing magistrate found probable cause to authorize a search. *Andresen* v. *Maryland*, 427 U.S. at 480-482; *United States* v. *Johnson*, 690 F.2d 60, 64 (3d Cir. 1982), cert. denied, No. 82-5869 (Feb. 22, 1983). The court of appeals

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[4]Petitioner Solomon contends that none of the agents participating in the search received a copy of the affidavit (82-1291 Pet. 32). This is simply wrong. Agent Geitgey testified that, on the day before the search, he briefed the agents who were to participate in it, and that at that briefing he distributed copies of the warrant, the affidavit, and eight specimen pages from the Foster records (Teslovich App. 311-312). In addition, three or four complete copies of the Foster records were available for the agents to examine at the briefing (*ibid.*).

correctly concluded that, in light of the detailed statements in the affidavit, the description in the warrant of the things to be seized was sufficiently specific (Pet. App. 4a-5a). Further review of this essentially fact-bound issue is not warranted.

3. Petitioner Teslovich argues (83-1231 Pet. 11-16) that the seizure of the workpapers of Frank Lucas, the accountant who prepared the federal tax returns of Solomon & Teslovich, exceeded the scope of the warrant. But petitioner Teslovich concedes (83-1231 Pet. 11-12) that the workpapers seized from the office maintained by Lucas on the premises of Solomon & Teslovich were not the property of petitioners and that only Lucas had access to them. Since petitioner Teslovich does not, and could not, assert any legitimate expectation of privacy with respect to Lucas' papers, the court of appeals correctly held (Pet. App. 5a) that his Fourth Amendment rights were not violated by the seizure of these records. See *Rakas* v. *Illinois*, 439 U.S. 128, 132-149 (1978).[5]

4. Finally, petitioner Teslovich contends (83-1231 Pet. 16-18) that the agents failed to prepare an adequate inventory of the items taken in the search. Even if true,[6] petitioner

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[5] *Mancusi* v. *DeForte*, 392 U.S. 364, 368-369 (1968), cited by petitioner Teslovich (83-1231 Pet. 16), is not to the contrary, since in that case it was stipulated that DeForte, the defendant who sought to suppress the evidence seized in a warrantless search of his office, was the custodian of the records seized in the search, even though the office belonged to his employer and the records were official, not personal records. Whatever aid *Mancusi* might give Lucas if he were moving for suppression, it gives none to petitioner Teslovich.

[6] The only defect shown in the record is that the inventory was prepared by an agent other than the applicant for the warrant (see 83-1231 Pet. 16). But the agent who prepared the inventory was one of the two agents who had supervisory responsibility for the search. Thus, it is difficult to see how anyone was prejudiced. As for the specificity of the inventory, the volume of documents seized clearly made it impossible to list each and every one separately.

cites no authority, and we know of none, for the proposition that a violation of the inventory requirement of Fed. R. Crim. P. 41(d) is grounds for the suppression of evidence. The seizure of evidence pursuant to a valid warrant is not converted into a violation of the Fourth Amendment by the failure of the officers responsible for the seizure to comply with the "essentially ministerial" requirements of Fed. R. Crim. P. 41(d). *United States* v. *Hall*, 505 F.2d 961, 963 (3d Cir. 1974). See also *Cady* v. *Dombrowski*, 413 U.S. 433, 449 (1973). And even if the Fourth Amendment were violated by the failure to prepare the inventory properly, we fail to see how any evidence introduced at trial could be said to be a fruit of such an infraction.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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